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No. 82-1304

In the Supreme Court of the United States

OCTOBER TERM, 1982

MONTGOMERY WARD & CO., INCORPORATED,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly found that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by maintaining and enforcing a rule that prohibits solicitation of off-duty employees by nonemployee union organizers in the public cafeteria of petitioner's retail department store.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 692 F.2d 1115. The decision and order of the National Labor Relations Board (Pet. App. 27a-35a) are reported at 256 N.L.R.B. 800.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a-26a) was entered on November 10, 1982. The

petition for a writ of certiorari was filed on February 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a two-level retail department store in an enclosed shopping mall in Lombard, Illinois. The Buffeteria, a cafeteria-style restaurant, is located on the second floor of the store. The Buffeteria is open to the public, including petitioner's employees, who account for 10 to 20% of the restaurant's business. Customers may enter the Buffeteria from the shopping mall or from the parking lot but not from the retail store. Tables in the Buffeteria ordinarily are separated by three to three-and-a-half foot aisles. (Pet. App. 41a-43a.) Petitioner maintains a credit center on the store's lower level (*id.* at 43a). The credit center employees have a half-hour unpaid lunch period beginning at either noon or 12:30 p.m. (*id.* at 52a).

In early November 1977, following an inquiry by a credit center employee, the respondent union ("the Union") began organizing efforts among credit center employees. By letter dated November 22, the Union informed the credit center manager that it was conducting an organizing campaign (Pet. App. 44a). In response to requests by credit center employees to meet during lunch, Union organizers Regina Polk and John Garcia arranged to meet three employees during the employees' lunch break at noon on December 2 in the Buffeteria. The organizers also arranged to meet several other credit center employees that day at 12:30 p.m. in the Buffeteria (*id.* at 45a).

On the morning of December 2, organizers Polk and Garcia stood on the sidewalk outside the store and distributed union literature. Credit group personnel manager Reed Harvey saw the organizers

distributing literature and also heard "through the grapevine" that they were coming to the Buffeteria during lunch that day. Sometime that morning, Harvey and credit center manager Douglas Ruhl arranged to have lunch together in the Buffeteria (Pet. App. 45a).

At about noon, organizers Polk and Garcia arrived at the Buffeteria, which was half full. Upon entering, the organizers saw the three employees they were to meet seated at a cluster of tables eating their lunches. The closest Buffeteria patrons were seated about 15 feet away from the three employees. The employees motioned to Polk and Garcia, who then sat down with the employees. The employees informed the organizers that two members of management were in the Buffeteria and pointed out managers Harvey and Ruhl who were waiting in the cafeteria line. While the employees and organizers were talking, Harvey and Ruhl approached the group and asked to speak to the person in charge. Organizer Polk said she would talk to Harvey and Ruhl away from the employees. (Pet. App. 45a-46a.)

Harvey, Ruhl, and the two organizers left the Buffeteria and went into an aisle of the retail store. Harvey informed the organizers that they were violating petitioner's policy by coming to the Buffeteria to solicit employees.[1] He also told them that they

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[1] Petitioner's rule concerning solicitation on its premises provided in pertinent part (Pet. App. 59a):

> DISTRIBUTION OF LITERATURE AND SOLICITATION ON COMPANY TIME FOR NON-COMPANY ACTIVITIES
>
> * * * * *
>
> Solicitation by non-employees of the Company is prohibited at all times in the store and store operated buildings.

were trespassing and that they were not permitted to talk to employees or distribute literature in the Buffeteria. Harvey asked the organizers to leave and warned them that he would call the police if they did not go. Polk responded that she would not leave because the Buffeteria was public, that she was a member of the public, and that the employees with whom they were meeting were on their own time and had a right to engage in union activity. Harvey again threatened to call the police if the organizers did not leave and indicated that he was following the orders of petitioner's head of labor relations. (Pet. App. 46a-47a.)

At this point, the four returned to the Buffeteria. Harvey telephoned the police, and Polk and Garcia returned to the table where they had been sitting. In response to the employees' qustions about their conversation with Harvey and Ruhl, Polk said that the organizers were going to have problems meeting with the employees in the cafeteria, that they would have to make other arrangements, and that she would talk to the employees about it later. Polk asked the employees to tell the others with whom the organizers were to meet at 12:30 p.m. that a meeting was not a good idea and that management had told the organizers to leave and was going to call the police. Polk and Garcia then went through the cafeteria line and purchased food. (Pet. App. 47a-48a.)

As soon as Polk and Garcia returned to their table and began to eat, two police officers arrived at the Buffeteria. After talking for about ten minutes, Harvey, Ruhl and the police officers came over to the

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It is a violation of the Company's No Solicitation rule either to solicit or be solicited in a manner prohibited by this rule.

organizers' table and sat down.[2] Harvey told the organizers that they could finish their lunches, but that, if they stayed longer, he would have a complaint issued against them and have them removed. Harvey warned the organizers that he and Ruhl would sit in the Buffeteria to make sure the organizers did not talk to employees. One of the policemen stated that if petitioner swore out a complaint against the organizers, the police would have to arrest them for trespassing. The police asked the organizers for their names, addresses, and identification and then left the Buffeteria. When the organizers finished eating, Harvey, Ruhl, and a plainclothes security officer escorted them out of the building. (Pet. App. 48a-49a.) The Union subsequently filed an unfair labor practice charge with the Board.

2. The Board, adopting the findings of the Administrative Law Judge, concluded that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by maintaining and enforcing a rule against solicitation of off-duty employees by non-employee union organizers in its public cafeteria with the purpose of discriminating against union solicita-

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[2] By this time, the three employees had finished their lunch and had left the Buffeteria. On the way back to their work areas, the three employees saw the employees the union organizers were to meet at 12:30 p.m. and told them that police officers and members of management were in the Buffeteria and that the employees should not sit with the union organizers. When these employees arrived in the Buffeteria, ey saw managers Harvey and Ruhl talking with the police officers and the union organizers sitting by themselves at a table. Polk motioned two or three of the employees away, and the employees sat at a table about eight feet from the organizers. (Pet. App. 48a.)

tion (Pet. App. 27a-28a, 65a, 68a).[3] The ALJ found that Manager Harvey testified that he approached the table at which the union organizers were seated because he "assumed they were there for union solicitation," but that he had never approached any other group in the Buffeteria in a similar attempt to enforce the no-solicitation rule. Harvey also testified that he was unsure whether he would prohibit solicitation in the Buffeteria on behalf of the Girl Scouts or the American Bar Association. (*Id.* at 62a-63a.) The ALJ found that petitioner had previously tolerated non-union solicitation in violation of the rule; that, although the rule was ostensibly in effect on December 2, 1977, it was not posted until several days after the incident in the Buffeteria; and that, although the rule barred only solicitation in the store and petitioner's other buildings, it had been invoked against the union organizers when they distributed union literature on a private sidewalk outside the store area (*id.* at 60a, 63a-64a).

The Board also concluded that petitioner's enforcement of its rule to bar union solicitation of off-duty employees by nonemployees in the Buffeteria violated Section 8(a)(1) of the Act, even apart from discriminatory application (Pet. App. 28a). The Board relied (*id.* at 29a) on its decision in *Marshall Field & Co.*, 98 N.L.R.B. 88, modified on other grounds and enforced, 200 F.2d 375 (7th Cir. 1952), in which it rejected the employer's contention that it could law-

[3] The ALJ also found that petitioner violated Section 8(a)(1) of the Act by engaging in surveillance of union activities and by threatening union organizers with arrest (Pet. App. 68a). The Board and the court of appeals upheld these findings (*id.* at 23a-24a, 32a-33a), and the petition does not raise any question as to them.

fully prohibit solicitation in its public restaurants on the ground that such activity would disrupt its business. In *Marshall Field* the Board explained (98 N.L.R.B. at 94) that the circumstances existing in the public restaurants, as opposed to other parts of the store, made remote the possibility of substantial interference with the employer's business by solicitation of off-duty employees.

The Board rejected petitioner's contention that under *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), petitioner could exclude union organizers from the public restaurant unless the organizers could demonstrate that they lacked alternative means for communicating with employees. The Board stated that "the *Babcock & Wilcox* rationale typically controls in situations where union organizers use 'private' property to which the public is not invited in a manner inconsistent with the property's intended purpose, rather than use of a public restaurant for personal discussion while dining" (Pet. App. 32a; footnote omitted).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-24a). The court concluded (*id.* at 11a) that substantial evidence supported the Board's finding that petitioner discriminatorily enforced its no-solicitation rule in a manner that coerced, restrained and interfered with the exercise of protected employee rights. The court also concluded that the record contained substantial evidence to support the Board's finding that, even apart from its discriminatory application, petitioner's no-solicitation rule was overly broad, since the employee and employer interests involved required "an accommodation which would allow solicitation by nonemployees in the Buffeteria when such organiza-

tional activity was carried on in a nondisruptive fashion consistent with the normal use of the restaurant" (*id.* at 18a).

The court rejected both the Board's contention that *Babcock & Wilcox* does not apply in cases in which the employer's premises are open to the public and petitioner's argument that the Board may not balance employer and employee interests unless there is a preliminary finding of inaccessibility to the union (Pet. App. 17a). The court cited this Court's conclusion in *Hudgens* v. *NLRB*, 424 U.S. 507, 522 (1976), that "the accommodation of § 7 rights and property rights was the core of *Babcock & Wilcox* * * * and that the proper accommodation of the two rights depended in each instance upon the context and the organizational activity involved" (Pet. App. 17a). The court of appeals found that the Board had considered the various interests involved here and had made a reasonable accommodation of those interests. In support of its conclusion that there was substantial evidence to support the Board's findings, the court cited both the obstacles to union access to employees and the minimal intrusion on petitioner's property interests in the circumstances of this case (*id.* at 18a-20a).

ARGUMENT

The court below correctly applied established legal principles to the facts of this case. Its decision does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner does not contest the Board's finding, upheld by the court of appeals (Pet. App. 11a-14a), that it discriminatorily enforced its no-solicitation

rule to bar access to its public cafeteria by nonemployee union organizers.[4] Under the decisions of this Court, it is well settled that an employer violates Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by maintaining or enforcing an otherwise valid no-solicitation rule in a discriminatory manner. See *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). See also *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 803 n.10 (1945). Accordingly, even if petitioner's no-solicitation rule could lawfully be applied in a nondiscriminatory manner to bar union solicitation by nonemployees in its cafeteria, petitioner's discriminatory enforcement of that rule nevertheless violated the Act.

2. Petitioner contends that the Board and the court of appeals erred in going on to hold that, even apart from its discriminatory application, petitioner's rule barring solicitation of off-duty employees by nonemployee union organizers in its public cafeteria violated Section 8(a)(1). Petitioner contends (Pet. 8-10) that, under *NLRB* v. *Babcock & Wilcox Co.*, *supra*, there must be a preliminary determination that nonemployee organizers cannot obtain access to employees in other ways before the organizers will be accorded access to the employer's property. That contention is based on an unduly narrow reading of *Babcock & Wilcox*.

In *Babcock & Wilcox* the issue was whether an employer could prevent nonemployee union representatives from engaging in organizational solicitation in the parking lot of the employer's industrial plant. This Court held that the employer could lawfully prohibit such activity, because, in the circum-

[4] There is ample evidentiary support for this finding. See pages 5-6, *supra*.

stances of that case, there were reasonable alternative means by which the union could communicate with employees.[5] The Court pointed out (351 U.S. at 112) that accommodation between organization rights and property rights should be reached "with as little destruction of one as is consistent with the maintenance of the other." Subsequently, in *Hudgens* v. *NLRB*, 424 U.S. 507, 522 (1976), a case involving employee picketing in support of a lawful strike in a shopping mall, the Court emphasized that the "*Babcock & Wilcox* opinion established [that] the basic objective under the Act [is] accommodation of § 7 rights and private property rights" and that the "locus of that accommodation * * * may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." [6]

Here the Board followed the mandate of *Babcock & Wilcox* and *Hudgens* by weighing and accommodating the interests of the employer and the employees. Accordingly, the only issue is whether the Board rea-

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[5] In *Babcock & Wilcox*, the factory was located one mile from a town of 21,000 people, where 40% of the 500 employees lived. The rest of the employees lived within a 30-mile radius. 351 U.S. at 106. In upholding the employer's right to exclude the nonemployee union organizers, this Court stressed that "[t]he plants are close to small well-settled communities where a large percentage of the employees live." *Id.* at 113.

[6] In *Hudgens* the Court remanded so that the Board could decide whether the employees' picketing was protected under the Act, directing the Board to consider a number of factors "which may or may not be relevant in striking the proper balance." 424 U.S. at 521-523. On remand, the Board concluded that the employer's property interest in excluding employee pickets should yield to the employees' Section 7 rights. *Scott Hudgens*, 230 N.L.R.B. 414 (1977).

sonably balanced the interests involved in concluding that, in the circumstances of this case, petitioner may not prohibit solicitation of off-duty employees by non-employee union organizers in the public restaurant of its retail store. There is rational support for the balance struck by the Board in this case, and the court below properly declined to upset it.[7]

Petitioner's contention that in the case of non-employee union organizers the existence of alternative means of access is dispositive, regardless of any other factors affecting the "nature and strength" of the rights and interests involved, is inconsistent with the flexible principles applied by this Court. Moreover, it conflicts with this Court's admonition that "mechanical answers" should be avoided in seeking a "solution of this non-mechanical, complex problem" of accommodating employee rights and employer property interests. *NLRB* v. *United Steelworkers*,

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[7] The court below noted that the employees' interest was substantial because there were major obstacles to union access to employees (Pet. App. 18a-19a). The setting of the shopping mall made it difficult for union organizers to follow employees to their homes; employees were unlikely to patronize other restaurants because of distance and the shortness of the lunch break; and the union organizers were unable to obtain a list of employees or to identify their cars in the parking lot. On the other hand, the employer's property interest was "minimally implicated" (*id.* at 19a-20a). The activities of the union organizers were not inconsistent with the normal use of the Buffeteria; the organizers were not distinguishable from other members of the general public, and their conduct was consistent with that of the other patrons; their conversation was inaudible to other patrons, and they did not distribute union literature or converse with patrons other than the employees they had arranged to meet; and the Buffeteria was only half full at the time the union organizers were there, so that they did not occupy tables that could have been used by other customers.

357 U.S. 357, 364 (1958). Instead, the approach taken by the court below, under which alternative access is merely one factor "in evaluating the strength of the competing interests at stake in a specific situation" (Pet. App. 19a n.11), is consistent with the teachings of this Court.[8]

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[8] Petitioner's reliance (Pet. 9-10) on *Central Hardware Co.* v. *NLRB*, 407 U.S. 539 (1972), for the proposition that a finding with respect to alternative means of access is a prerequisite to balancing of employer and employee interests is misplaced. In *Central Hardware*, the Court directed the court of appeals to apply the principles of *Babcock & Wilcox* in determining whether the union's organizational solicitation by nonemployees in the employer's parking lots was protected under the National Labor Relations Act. 407 U.S. at 548. Although the Court noted that the employer contested the Board's finding that there were no alternative reasonable means of union communication with employees (*id.* at 547-548), it did not indicate that that finding was dispositive. Moreover, *Central Hardware* antedated *Hudgens*, in which the Court clarified the *Babcock & Wilcox* principles.

Nor is petitioner aided by its reliance (Pet. 10-11) on *Sears Roebuck & Co.* v. *San Diego Council of Carpenters*, 436 U.S. 180 (1978). The focus in *Sears* was on activity that normally would constitute trespass and on "area standards" picketing, rather than organizational solicitation. The Court stated in *Sears* that the general rule is that the employer may bar nonemployee union organizers from trespassing on its property (436 U.S. at 205), although it indicated that the rule would not always apply. That statement was made in the context of an employer's attempt to obtain a state court injunction against alleged trespass in the form of "area standards" picketing on its private walkways and parking lots. The Court held that the state court suit was not preempted by the Act in the circumstances of that case because there was "serious question" whether "picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation" (436 U.S. at 206 & n.42), and because the union had failed to invoke the jurisdiction of the Board (*id.* at 202, 207).

Petitioner further errs in contending (Pet. 11-12) that the consideration by the court below of the fact that the Buffeteria was open to the public and that the union organizers were using it in a manner consistent with its purpose constitutes a "reversion" to *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). The Court in *Hudgens* v. *NLRB*, *supra*, overruled the constitutional rationale of *Logan Valley* and made it clear that the mere fact that a shopping center is open to the public is not sufficient to make it a governmental entity for First Amendment purposes. However, the Court did not pass on the entirely different question whether public use could be taken into account in striking the balance between Section 7 rights and property rights for purposes of the National Labor Relations Act. Indeed, the Court in *Hudgens* implicitly approved consideration of the fact that the shopping center in that case was open to the public, stating (424 U.S. at 522; emphasis added) that the locus of accommodation of conflicting interests would depend in part "on the *nature and strength* of the * * * private property rights asserted in any given context."[9]

Unlike *Sears*, the present case involves organizational solicitation. Moreover, as the court below pointed out, "[t]he organizers presumably would be invitees rather than trespassers to the extent that they merely entered the Buffeteria to have lunch with acquaintances" (Pet. App. 19a). Unlike in *Sears*, the organizers were using the employer's premises "in a manner consistent with their normal business use" (Pet. App. 20a n.12). Thus, the justification for finding that the activity here was protected by Section 7 of the Act is far stronger than it was in *Sears*.

[9] Petitioner's final contention (Pet. 13-14) that the court below improperly considered the issue of alternative access because the Board had not first considered it does not afford a basis for review by this Court. The factors the court iden-

Thus, it is clear that nothing in *Hudgens* bars the Board from considering the public nature of the Buffeteria and the manner of its use as one factor in reaching an accommodation of employee and employer interests here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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National Labor Relations Board

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tified as creating "obstacles" to the union organizers' access to credit center employees (see Pet. App. 19a) are factors the Board in prior cases had found to justify entry by nonemployee union organizers upon the employer's premises. See *Hutzler Brothers Co.*, 241 N.L.R.B. 914 (1979), enforcement denied, 630 F.2d 1012 (4th Cir. 1980); *Scholle Chemical Corp.*, 192 N.L.R.B. 724 (1971), enforced, 82 L.R.R.M. 2410 (7th Cir. 1972).

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